

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 ALEXSAM, INC.) (
5) (CIVIL DOCKET NO.
6) (2:07-CV-288-TJW
7 VS.) (MARSHALL, TEXAS
8) (
9 EVOLUTION BENEFITS,) (NOVEMBER 24, 2009
10 INC., ET AL.) (9:20 A.M.

11 PRE-TRIAL HEARING
12 BEFORE THE HONORABLE JUDGE JOHN WARD
13 UNITED STATES DISTRICT JUDGE

14
15 APPEARANCES:

16
17 FOR THE PLAINTIFF: MR. JAMES FOSTER
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transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated.

3 All right. We have a pretrial this morning
4 in Alexsam versus Evolution Benefits and Humana,
5 2:07-288.

6 What says the plaintiff?

7 MR. FOSTER: Your Honor, James Foster is
8 here with Allen Rugg and Gerald Hrycyszyn.

9 THE COURT: Are you ready to proceed?

10 MR. FOSTER: Yes, Your Honor.

11 THE COURT: All right. Defendant?

12 MR. WELCH: Good morning, Your Honor.

13 Claude Welch, on behalf of Defendant Humana, Inc., and
14 we are ready to proceed, Your Honor. At counsel table
15 with me this morning, Your Honor, is Mike Speed and Jeff
16 Standley who will be making the presentation this
17 morning.

18 THE COURT: Okay. Now, Evolution Benefits,
19 they're out of the case?

20 MR. WELCH: Yes, Your Honor.

21 THE COURT: All right. I just realized I
22 read both their names.

23 All right. We're going to -- we'll get into
24 these motions in just a little bit. We're going to
25 select a jury in this case on the 30th. As far as I

1 know, you'll be the first jury. And I think I'm down to
2 selecting two juries now next -- so we'll go ahead and
3 pick your jury Monday morning, first jury.

4 You can -- if you're interested, you can get
5 a list of the prospective jurors tomorrow at noon in the
6 clerk's office.

7 I believe -- now, I'll give you 30 minutes a
8 side for voir dire. Mr. Rugg's been here before. Of
9 course, Mr. Welch has been around a long time, maybe as
10 long as I have, and -- but so you'll under -- I'll make
11 you aware of the way this works. The jurors will
12 come -- will be seated in the jury box on this first
13 bench and then a couple of rows. It will probably be
14 about 26 or 28 potential jurors.

15 Each juror, after I make some initial
16 remarks to them and talk a little bit about the patent
17 case, each juror will stand, and there's a series, I
18 believe, of nine questions that they have that will be
19 on the screen. Ms. Dupree will make you a copy of what
20 those questions are. Each will stand and will give that
21 information in turn, and after we've done that, then
22 plaintiff will have up to 30 minutes a side to ask
23 additional questions. Each side will have an additional
24 30 minutes.

25 And then you'll have the opportunity to --

1 we'll approach and have the opportunity to identify any
2 jurors that you wish to have individual voir dire of if
3 there's something that's come up. I will encourage the
4 jurors to make full and complete disclosure about
5 themselves and answer any of your questions, and if
6 something comes up that causes you to believe that you
7 need individual voir dire, if you'll indicate that to
8 me, well -- or I may interrupt you and say, "We'll take
9 that up further with the Court." Then we'll take --
10 we'll take up those individual voir dices.

11 And then you will have the opportunity to
12 exercise your strikes. I will seat 10 jurors. Each
13 side will have four strikes, peremptory strikes, after
14 you've made your challenges for cause and I've given you
15 a ruling on those, so that you'll know what your panel
16 ultimately will be striking from.

17 And so then we will come back and commence
18 trial on the morning of December 7th at 8:30. Go from
19 8:30 until -- you know, have a break in the morning,
20 hour, hour and 15 minute lunch, break in the afternoon,
21 and then quit not later than 5:30, generally. That's a
22 pretty full day.

23 And we discussed -- the more I look at this
24 case, I'm still -- I don't quite understand why y'all
25 need about -- more than about 10 hours a side to try

1 this lawsuit. Is there some reason that -- I still
2 don't understand it.

3 MR. STANDLEY: Your Honor, Jeff Standley on
4 behalf of Humana. Just looking at our witnesses and who
5 we intend to call and the amount of time, we were hoping
6 to persuade you to go to 14 hours per side.

7 THE COURT: I just don't see it. You know,
8 I tried a patent case last week, and one side -- you
9 know, I gave them 12 hours a side. We were out of here
10 in 17 hours.

11 MR. STANDLEY: Your Honor, we would take 12
12 hours per side.

13 THE COURT: I'm sure you would, but that was
14 a different case, Counselor. That had two -- that had
15 an additional claim of unfair competition in it that you
16 don't have in this case. Oh, I don't know, you'd take
17 12 hours a side?

18 MR. STANDLEY: Your Honor, I might add, I
19 know we're going to be talking about this in the next
20 few minutes, but the other side has made several
21 objections to evidentiary documents.

22 THE COURT: Oh, we're going to talk about --
23 we're going to have all that taken care of because y'all
24 are going to meet back here on March 3rd in front of
25 Judge Everingham to take up all these evidentiary

1 objections. March -- I mean, December the 3rd. March,
2 senior moment, I guess. December 3rd at 9:30. That's
3 the way we do all of our cases. All of -- 95 percent of
4 the objections to the documents will have been resolved
5 to the extent I don't resolve some here today by some of
6 these rulings on the motions in limine.

7 So you'll have an exhibit list with --
8 generally it's a hundred percent, but there's sometimes
9 some documents I've just got to hear some testimony on.
10 And so all of that will be done ahead of time. So
11 all -- we just -- we won't waste any time in front of
12 the jury as far as foundation-type questions.

13 MR. STANDLEY: And that will certainly help
14 us get this down to 12, Your Honor.

15 THE COURT: I'll get you down to 10 now.
16 You talked me down to -- you were talking about 14 when
17 you were talking about the evidentiary objections.

18 Mr. Rugg, can't you -- don't you think you
19 can get it done in 10 or not?

20 MR. RUGG: Oh, we're pretty confident we can
21 do it in 10, Your Honor.

22 THE COURT: Well, unless something unusual
23 comes up, I'm going to leave it at 10, unless Judge
24 Everingham tells me, "Oh, no, you've made a mistake. I
25 think you ought to give them 12." So it's 10 hours a

1 side.

2 And I should tell you, I anticipate us
3 getting the case to the jury either on the Thursday
4 afternoon of that week or at the very latest on Friday
5 morning, and Judge Everingham, if the jury deliberates
6 past noon, Judge Everingham will -- is there any
7 objection from the plaintiff of Judge Everingham being
8 the one that preside --- that handles the jury
9 deliberations?

10 MR. FOSTER: None, Your Honor.

11 THE COURT: Anything from the defendant?

12 MR. WELCH: No, Your Honor.

13 THE COURT: Okay. I've stated this on the
14 record before, you know, but the Court, it is well known
15 that I have this addiction to shotguns and bird dogs and
16 quail, and so I'm leaving -- wanting to leave at 1:00
17 o'clock that day to travel with my son to go hunting.
18 So that's -- I'll just fess up on the record. I'm
19 not just -- I'm just taking care of my addiction.
20 That's all I can tell you about that.

21 Now, then, you got that date, be here with
22 Judge Everingham on the 3rd. What we will do also is
23 since we're going to pick two juries, we won't show that
24 film, but I will before we start, on the morning of the
25 7th, I will have the district -- have the clerk show the

1 film from the Federal Judicial Center.

2 Any objections you wish to make, make
3 written objections. I'm sort of like -- I didn't --
4 didn't do that until I talked to Judge Ron White out in
5 the Northern District. He and I were on a committee
6 together for a year or so, and he says, "I show it every
7 time." So, I mean, I believe I'll -- I'll show the
8 film. If you wish to file any objection, please feel
9 free to do so. Maybe you can raise one I haven't heard
10 yet. But I wanted you to know that.

11 Then you'll make opening statements. 30
12 minutes a side for opening statements.

13 With respect to using -- of course, any
14 exhibit that has been ruled on by Judge Everingham as
15 being admissible, you can refer to any exhibit that's
16 been ruled on by Judge Everingham as -- if you
17 anticipate -- in your opening statements, I'm sorry.
18 And, of course, during the trial, any exhibit that has
19 been ruled on by Judge Everingham, you don't need to lay
20 any foundation. You just need to ask whatever questions
21 you feel necessary to place it in context before the
22 jury, because it will already be deemed admitted, and it
23 will be ready.

24 Additionally, now, with respect to
25 demonstrative exhibits, if you have and can exchange

1 demonstrative exhibits before you meet with Judge
2 Everingham so he can rule on those, then you can use any
3 demonstrative exhibits that have been exchanged, and
4 absent objection, you can use those.

5 I've had the situation come up on the
6 morning of trial that parties show up and both sides
7 want to object to the other side's demonstrative
8 exhibits for opening statements. The Court's manner in
9 which I handle that is demonstrative exhibits
10 necessarily have to be based on evidence that's been
11 introduced and before the jury. If you can't agree on
12 them at that stage, neither side will get to use them.
13 That's the way that works. So -- so I didn't want you
14 to think we're going to spend the morning taking up
15 objections at the last minute on demonstrative exhibits.

16 Now, we're going to take up this morning the
17 motions in limine, and the Court's going to take time to
18 listen to your arguments on motions in limine, and when
19 I make a ruling on a motion in limine, it is not a final
20 definitive ruling, but it is a ruling that you are not
21 to touch that -- any of those matters that I've granted
22 or sustained the motion on directly or indirectly
23 without first approaching the bench and talking to me as
24 to why you think that you should be relieved from the
25 application of my order.

1 And sometimes I agree with you that people,
2 quote, open the door or something has come up that I
3 think it's -- has become admissible. But do not wade
4 off into one of these matters without approaching the
5 bench. You'll see that my neck starts getting red, and
6 that's just not good for me or for whoever's doing it.
7 And after a couple of times, I start talking to the
8 jury, and it's -- it's very punitive to whoever's
9 violated my motion, and it's intended to be, and so I
10 just want to make that sort of clear to you.

11 And I would encourage you to talk to your --
12 let your experts know that I don't always wait for
13 objections. This isn't a lecture hall for some
14 professor to give a lecture. This is a, you know,
15 United States District Courtroom, answer the questions
16 asked and they start getting nonresponsive, I'm liable
17 to be right in the middle of it without an objection
18 because there's -- I've always -- there's two things I
19 thought that were unfair, particularly in state court in
20 this part of the world in trying lawsuits, that was that
21 judges that didn't enforce their motions in limine and
22 judges that didn't control expert s. And so in the 10
23 plus years I've been on the bench, I've sort of tried to
24 make sure that I didn't make those same type of errors
25 that I complained about so loudly.

1 And so with that, any questions about what
2 we talked about up to this point, clarification?

3 MR. FOSTER: Your Honor, just a brief --
4 should I go to the podium?

5 THE COURT: That's all right for this
6 purpose.

7 MR. FOSTER: Brief question. Not having
8 tried a case before Your Honor, but some judges have
9 different practices with respect to admissibility of
10 demonstratives. Some keep out all demonstratives. Some
11 let them all go back in the jury room.

12 THE COURT: Okay. Okay. That's a fair
13 question. That was going to come up in connection with
14 one of your motions in limine, actually, I think.

15 If -- if I allow a witness to -- you know, a
16 witness says that he believes a demonstrative would help
17 him explain his testimony and it's not -- and it's based
18 on something that's previously been revealed, otherwise
19 can be used as a demonstrative, then I allow it, but
20 it's -- it's for demonstrative purposes only, and it
21 will not go back to the jury room, even upon written
22 requests.

23 And you should know that I did not send all
24 exhibits back. I send only those exhibits back that
25 they request. If -- generally, I require from the, you

1 know, patent case, if the parties have a notebook for
2 each one of the jurors that has at least the
3 patent-in-suit, and I would recommend to you that you
4 type the claims up. Aren't there two asserted claims in
5 this case? Type the claims up on separate pieces -- so
6 they're not such small print as those -- I mean, just
7 asserted claims, nothing more than copying.

8 And the other requirement is the -- to pull
9 out of the Markman order what the terms that I actually
10 defined. I haven't looked at this Markman order, but,
11 you know, where I actually define the terms, and that
12 way they have in front of them those terms that will
13 define the claim -- I mean, they have the claims and the
14 terms that have been defined by the Court, and so that
15 needs to be put together for all 10 jurors.

16 Then if y'all -- if you by agreement want to
17 add any other exhibit to the -- to the juror notebook,
18 some that have been admitted, as long as it's by
19 agreement, I'm happy for that to be in the juror's
20 notebook. However, I do not have hearings to argue
21 about what's -- I'm telling you what I'm going to
22 require in the juror's notebook. Anything else that
23 goes in there is by agreement, not by -- the Court
24 doesn't rule on anything else.

25 Does that answer your question, Counselor?

1 MR. FOSTER: Yes, it does, Your Honor.

2 Thank you.

3 THE COURT: Anything from the defense side,
4 any clarification on anything?

5 MR. WELCH: I just have had one question. I
6 understood everything you said, Your Honor. You'll show
7 the film the morning of December the 7th --

8 THE COURT: That's correct.

9 MR. SPEED: Okay. All right. Thank you.

10 THE COURT: Before opening statements.

11 MR. WELCH: Thank you.

12 MR. STANDLEY: Your Honor, I had one
13 question.

14 THE COURT: Yes, sir.

15 MR. STANDLEY: Jeff Standley. My paralegal
16 would shoot me if I didn't ask this. She wanted to know
17 if there was a time where we could get with your
18 courtroom staff and go over electronics to make sure
19 that we know what's working and how it works.

20 THE COURT: Just call Ms. Dupree. We -- we
21 make the court available to you. I mean, just make sure
22 that somebody's going to be here and that I'm not in
23 court.

24 I'm going to be out at a judicial conference
25 committee meeting the 1st, 2nd -- yeah 1st, 2nd, and

1 3rd, and on the 4th, there's a judge's meeting in
2 Beaumont, Eastern District judges, so I'll be out that
3 week, unless Judge Everingham has something unusual
4 scheduled in here.

5 Don't we have some school group that wanted
6 to use the courtroom one day?

7 MS. DUPREE: Yes.

8 THE COURT: Well, just check with Ms. Dupree
9 here, and she'll give you a time, and if you wanted to
10 do it on the same date that you have the evidentiary
11 hearing before Judge Everingham downstairs, that
12 might -- that's -- if it's available, just any time it's
13 available is fine with the Court.

14 All right. Let's see, we'll take up first
15 the plaintiff's motion in limine. I've got this
16 stipulation with respect to -- are there any more
17 agreements that y'all have worked out on any of the
18 plaintiff's motions in limine, other than what's in this
19 stipulation?

20 MR. FOSTER: Your Honor, if I might, I read
21 this morning on my computer a document which was filed
22 in the last 24 hours, and so I think that there are
23 certain positions that plaintiff has taken -- that the
24 defendants have taken they've backed off on, but I don't
25 have the paper. I only read it this morning.

1 THE COURT: Okay. Well, all right, we'll
2 just take them up here as we go. As I understand, let
3 me make sure from the defendant's standpoint, with
4 respect to this plaintiff's motion to exclude evidence
5 and testimony referring to other lawsuits, I read
6 your -- well, there's two different ways I can read the
7 second sentence.

8 I'm not clear. Are you saying that on the
9 second sentence of your stipulation that you would offer
10 or this deposition testimony only in impeachment, or are
11 you saying that you're offering it -- want to offer it
12 in your case-in-chief?

13 MR. SPEED: Your Honor, we --

14 THE COURT: Please, for the court reporter.

15 MR. SPEED: Mike Speed. Your Honor, we have
16 identified some deposition portions from prior lawsuits
17 that we may offer in our case-in-chief.

18 THE COURT: Okay. Well, you need to take
19 that up, then, before Judge Everingham. But tell me for
20 the purpose of this motion in limine, I've read all
21 these replies, and I've got a lot of things rolling
22 through my head, and so I have a bathtub brain, that is,
23 it's got a limited capacity, and I have to get -- part
24 something out before I can get something else in, but
25 are you talking about this -- the financial success or

1 failure of this -- of this venture with STI? Is that
2 what you're -- is that where the testimony goes?

3 MR. SPEED: That -- that's subject to a
4 different motion, but I'll go ahead and address that if
5 you don't mind.

6 THE COURT: Well -- well, what is the
7 testimony that -- that you want to use in your
8 case-in-chief?

9 MR. SPEED: There -- there is some testimony
10 from prior depositions about what Mr. Dorf invented,
11 what he didn't invent, what his concept of what he
12 invented was, some background information about
13 invention date and conception date and -- and matters
14 such as that.

15 The fact that the lawsuit exists is not
16 relevant to us, and we don't want to put that in. We
17 just want that testimony.

18 THE COURT: Well, let me make sure that I --
19 all right. I'm sustaining it as to any lawsuit. You
20 know, that's what stip -- it's sustained to that. And
21 if you -- this deposition testimony, when you identify
22 it, you just identify it as prior sworn testimony and
23 the date of it, and don't make any reference that this
24 was given in a lawsuit or anything else. It was just in
25 a proceeding, and this is the date of it, and you were

1 under oath, okay?

2 MR. SPEED: Understood.

3 THE COURT: Now, then, I don't know -- then
4 I want you to have those specific parts marked for the
5 evidentiary hearing -- in other words, at the
6 evidentiary hearing before Judge Everingham, you're
7 going to take up exhibits and deposition cuts. This
8 will be a deposition cut.

9 MR. SPEED: I understand, Your Honor.

10 THE COURT: Since it's a case-in-chief and
11 you're not saying you're -- you anticipate using it more
12 than for impeachment then?

13 MR. SPEED: Yeah, at this point, Your Honor.

14 THE COURT: Okay. All right. Then Judge
15 Everingham will take up the specific cuts, but that's
16 the Court's instruction to you as far as how to use it,
17 okay?

18 MR. SPEED: Okay.

19 THE COURT: Are there any other matters that
20 you believe are covered by your motion that -- that I
21 haven't addressed there, Counselor?

22 MR. FOSTER: That particular motion.

23 THE COURT: No, that's what I'm saying,
24 that's just that one.

25 MR. FOSTER: Do you want me to discuss the

1 other motions now, Your Honor?

2 THE COURT: No, I just want to ask you, have
3 we taken care of that one as far as you're concerned.

4 MR. FOSTER: Yes.

5 THE COURT: We're going to move to the next
6 one right quick. The other one in my order is dealing
7 with this license -- license issue. The Court has
8 consistently ruled that a license in connection with a
9 settlement of a lawsuit is not admissible in this Court.
10 Every case we've tried, either myself or Judge
11 Everingham, that's been our ruling. So I sustain it as
12 to any license that was a part of a settlement
13 agreement.

14 Now, then, tell me what the other objections
15 are from the plaintiff.

16 MR. FOSTER: Sure.

17 THE COURT: If you would, from the podium.

18 MR. FOSTER: Other license issue, Your
19 Honor, before we leave Your Honor's last ruling, I just
20 want to make sure that defendants do not have an
21 argument with us as to which licenses are in settlement
22 of lawsuits. There is one lawsuit which is actually
23 before Your Honor in which two of the defendants settled
24 out and signed license agreements, but the position they
25 have taken since the documents didn't say settlement

1 agreements, they're license agreements and their witness
2 can testify.

3 Is that still your position?

4 MR. SPEED: That's our position and then
5 some, Your Honor. If you don't mind, Your Honor, after
6 he's finished, I'd like to address -- I understand your
7 consistent ruling, but I'd like to address that briefly
8 if you don't mind when he's finished.

9 THE COURT: Well, if you want to waste your
10 time, that's fine.

11 MR. SPEED: Okay. All right.

12 MR. FOSTER: The next one, there's another
13 license -- five licenses, but that takes care of two.

14 There was one license which involved their
15 client and the deposition testimony we cited was that
16 they were making restitution. They were settling the
17 issue, but there was not a lawsuit. So that -- that may
18 be some -- that may be on the borderline of what Your
19 Honor is ruling on, and that's part of our preliminary
20 motion.

21 The other --

22 THE COURT: Well, does the defendant
23 disagree with the characterization of what the testimony
24 shows?

25 MR. SPEED: Your Honor, the testimony shows

1 that it was not a settlement. The testimony shows that,
2 yes, they may have been concerned about infringement,
3 but every license entered into there's a concern about
4 infringement.

5 So there was no lawsuit between Evolution
6 Benefits -- for the court reporter.

7 There was no lawsuit between Evolution
8 Benefits. There was no accusation of infringement.
9 There was -- Evolution Benefits, we have a patent on
10 this particular process, this processing hub issue. The
11 testimony said it was not a settlement, and it was
12 entered into, and it was negotiated over a several-month
13 period.

14 THE COURT: Well, there are issues that
15 you're going to need to take up, as to whether they're
16 admissible or whether they're covered by the motion in
17 limine, before Judge Everingham, then.

18 MR. SPEED: Okay.

19 THE COURT: That's -- but I'm giving you my
20 ruling. Now, if you want to address that ruling, well,
21 go ahead.

22 MR. SPEED: Can I? Your Honor, and I am
23 fully aware of your consistent practice on this, and I
24 just want to point out, there seems to be at this point
25 a split in the districts on this very issue, and I don't

1 think the Fifth Circuit has come down either way.

2 It seems to me patent licenses by their very
3 nature cannot be entered into willy-nilly. They can't
4 be entered into just to settle a lawsuit, because if you
5 go too far with the patent license, you are jeopardizing
6 the monopoly that the patent statute gives you. You
7 can't license products that aren't covered.

8 You know, you can take a license for, okay,
9 I'll license, and I may never do it. That's allowed.
10 But once you start down the process of licensing
11 products, marketing products, requiring marketing and
12 license agreements, paying per product, then you're
13 getting into the statutory requirements of what's
14 appropriate for a license.

15 So just because you entered into that
16 license because someone threatened you with litigation
17 or threatened you with infringement should not make a
18 license agreement per se admissible. It may go to
19 weight. I certainly understand that, but the issue is
20 should it -- should it be inadmissible.

21 And I unfortunately or fortunately,
22 depending upon your point of view, you and I have a
23 difference of opinion on that, so -- but I certainly
24 understand --

25 THE COURT: Let me tell you what my

1 experience is, Counselor, sometimes the plaintiff is the
2 one that wants to introduce it, and sometimes it's the
3 defendant. So it's just a question, as I like to put
4 it, it's a question of whose ox is getting gored, but
5 that's not really my -- that doesn't have anything to
6 with my decision.

7 MR. SPEED: I understand.

8 THE COURT: I made some decision early on,
9 and I've stayed with it because it's part of my
10 philosophy as a district judge at this level that I'm
11 supposed to be consistent as I possibly can unless the
12 Circuit says I'm wrong, and they haven't, so your
13 motion -- my ruling stands.

14 MR. SPEED: I under -- I understand. So
15 just so I'm clear, Your Honor, we'll address which
16 licenses are covered within your motion in limine --

17 THE COURT: That's right. Which one --
18 you're -- you're contending that some are not the result
19 of a settlement.

20 MR. SPEED: There were two that were
21 definitely not, there were two that definitely were, and
22 there's this one between Humana and Evolution Benefits
23 that they argue was and we argue that wasn't.

24 THE COURT: Y'all need to take that up in
25 the evidentiary hearing.

1 MR. SPEED: Okay.

2 THE COURT: Because Judge Everingham, he
3 knows what I'm going to rule before I tell him on this
4 issue.

5 All right. Now, if there's some more --
6 other matters covered under --

7 MR. FOSTER: Your Honor?

8 THE COURT: Does that take care of --

9 MR. FOSTER: Sure. There were two other
10 licenses. Let me just describe them briefly. One is
11 easily described. There were two companies, Robert
12 Dorf, the patentee, is the owner of Alexsam. He had
13 another company called ICF, which he also owned, and the
14 patent was licensed from one of those companies to the
15 other. And since they're wholly-owned companies and not
16 really operating under the patent, our argument, based
17 on the authority we cited, is that's not the kind of
18 license agreement which would be proper evidence on what
19 would have been agreed to between parties such as Humana
20 and such as Alexsam if they're doing a hypothetical
21 license agreement, which typically comes up in patent
22 agreements. It's a closed agreement between two wholly
23 owned companies, representative.

24 And the other license unless --

25 THE COURT: Go ahead.

1 MR. FOSTER: -- you have questions about
2 that. The other license is the Mastercard license.
3 That is not a settlement license, quite correct, and we
4 discuss that in our papers. That is a license that does
5 not cover the claims of this patent. Those cover the
6 activation claims that were involved in the other
7 lawsuit.

8 THE COURT: They don't cover the claims that
9 are asserted in this lawsuit. Are they claims that are
10 in the patent?

11 MR. FOSTER: They cover other -- the --
12 the --

13 THE COURT: They're other inventions within
14 the same patent?

15 MR. FOSTER: Yeah. The license which is
16 attached to the papers gives them a right to process
17 activations, and they had to pay a certain amount of
18 those activations.

19 THE COURT: It's overruled as to that
20 license.

21 MR. FOSTER: Okay.

22 THE COURT: You know, that goes to the
23 weight, and that's not...

24 MR. FOSTER: Then other than the ICF
25 license, which I just addressed, Your Honor, that

1 completes our presentation on that motion.

2 THE COURT: Well, I'll let you -- that needs
3 to be brought -- I need to discuss that with Judge
4 Everingham. We may have had that arise, and in order to
5 be consistent, I'll let him tell you about what we're
6 going to do on that.

7 MR. FOSTER: Thank you, Your Honor.

8 THE COURT: But you're saying -- do
9 you dispute -- from the defendant, do you dispute that
10 it was a license agreement between two wholly-owned
11 companies or subsidiaries?

12 MR. SPEED: I do not, Your Honor, but part
13 of the testimony that we were talking about from
14 Mr. Dorf was a deal -- a discussion about how that was
15 negotiated at arms length, how we believe that was a
16 reasonable royalty to have between --

17 THE COURT: Okay. Well, that needs -- that
18 definitely needs to be brought up with Judge Everingham
19 because you're now telling me something I didn't hear.

20 MR. SPEED: Right.

21 THE COURT: Okay. All right.

22 Okay. This next motion that I've got before
23 me is this -- about the financial dispute that Dorf had
24 with, I guess, STI -- SSTI? Is that what that motion
25 goes to?

1 MR. FOSTER: Your Honor, I -- I guess I'll
2 address it first since it's our motion, and -- and I'm
3 not sure how much you agree or disagree between the
4 parties based upon my readings of documents, which --

5 THE COURT: Well, I guess -- I'd like to
6 just hear from the defendant what it is you would like
7 to introduce that would violate this motion. I guess
8 that's sort of my -- to make sure I understand the
9 dispute.

10 MR. SPEED: Your Honor, can I lay just a
11 little bit of background?

12 THE COURT: Sure.

13 MR. SPEED: SSTI is the company that built
14 the processing hub for Mr. Dorf when he attempted to
15 create an embodiment of some of the claims in this
16 patent. SSTI was hired by Mr. Dorf to, you know,
17 program, create, select the hardware, et cetera.

18 What we're concerned about is testimony
19 coming in from the plaintiff of the nature, I invested a
20 lot of sweat and energy and money in coming up with the
21 concept and reducing to practice and creating a -- a
22 workable product.

23 Well, if that information comes in and we're
24 not permitted to cross examine or bring in the testimony
25 from the person that he hired, Mr. Levenson, hired to

1 help build the system, and then ultimately didn't pay, I
2 think it's prejudicial to us for Mr. Dorf to stand up
3 and say, "I spent all this money, and I had this great
4 investment," but he didn't because he didn't pay for it.
5 And Mr. -- and to be honest with you, it didn't work.
6 Mr. Levenson testified that the system they built was
7 ultimately junk, and it didn't work.

8 So what we're concerned about, because I've
9 seen patent plaintiffs and the inventors get up and pat
10 themselves on the back about what I did and how I did it
11 and how good it was and how much money I spent and how
12 much sweat I put into this. And if we get into that and
13 we're not allowed to use the information from SSTI to
14 counter that, it seems to me prejudicial to the
15 defendant.

16 THE COURT: Well, are you talking -- well,
17 I sort of see this as sort of a dividing line between
18 if Dorf -- if the inventor gets up here and says, "This
19 was -- you know, this was a successful product", or, you
20 know, my -- then -- then, obviously, they've opened the
21 door to show that it's not a successful product.

22 On the other hand, if he gets up and says,
23 you know, "It was hard work, and I worked hard, and I --
24 making this invention, I put a lot of my time and effort
25 into it," he hadn't opened the door yet, it doesn't seem

1 to me. I guess it depends on how far he goes.

2 MR. SPEED: To some -- to some degree, Your
3 Honor, I agree with that, but I do think --

4 THE COURT: Well, let's talk about the
5 degree that you don't agree with it, then.

6 MR. SPEED: Well, there's also I think we
7 should have the ability to irrespective of whether the
8 door is opened, and that may goes to the \$650,000.00
9 that he didn't pay SSTI, but I do think I should be
10 allowed to introduce testimony from SSTI to say, you
11 know, a material part of the reduction to practice of
12 this invention was done by SSTI. So that's a separate
13 issue.

14 The first issue is should I be allowed to
15 question Mr. Dorf about not paying the \$650,000.00 if --

16 THE COURT: Well, I don't believe you should
17 absent --

18 MR. SPEED: Absent opening the door, and
19 I -- I understand that, and I'm with you on that, Judge.

20 THE COURT: Okay.

21 MR. SPEED: The second issue, though, is I
22 believe I should be able allowed to say and bring in the
23 testimony from SSTI that says, "Hey, this is what I did.
24 This is my aspect. This is" -- you know, you're going
25 to hear testimony Mr. Dorf isn't a programmer. He's

1 not a -- has a background in computers, and processing
2 hub is the novel feature in this patent. And so I think
3 it's important to hear from the person that actually
4 built that.

5 THE COURT: What's your position -- why is
6 he wrong on that, Counselor?

7 MR. FOSTER: Your Honor, I'm a little bit
8 surprised. In the last 24 hours, they have filed papers
9 with the Court saying that they would not claim -- that
10 the -- and make any arguments with respect to incorrect
11 inventorship. This was one of the grounds of our
12 motion, and I assume Mr. Speed was involved in those
13 papers.

14 I thought the inventorship issue was out of
15 the case, and they're trying -- if I hear them
16 correctly, trying to put it back in, but if it's back
17 in, I'll address it.

18 THE COURT: Well, I thought inventorship was
19 out.

20 MR. SPEED: Inventorship is out, Your Honor,
21 but I think it's -- and that's -- and that's not the
22 reason why we -- we want to put on some context on who
23 did what, who was responsible for bringing -- what --
24 what pieces parts did Mr. Dorf build? What pieces parts
25 did he hire out?

1 It's not necessarily inventorship per se to
2 that that Levenson should be an inventor. That --
3 that's not what we're going to argue. That's not part
4 of this case. But what should be allowed is there's
5 going to be testimony from Mr. Dorf about what he did,
6 what his concept was, what his reduction to practice is.
7 We know that testimony is going to come in, because I've
8 never seen a patent case where it's not.

9 Well, if the material part of that reduction
10 to practice is hiring a third party, I should be allowed
11 talk to that person and have that person's testimony
12 played before the jury.

13 THE COURT: Well, from my perspective, I'm
14 sustaining the motion until I hear the evidence that you
15 think that's going to cause it -- I'm sustaining the
16 motion at this point, and then -- it's going to depend
17 on what Dorf says.

18 MR. SPEED: Thank you, Your Honor.

19 THE COURT: They may open the door. Those
20 that have tried lawsuits here, you can take Mr. Rugg, he
21 knows that -- he's heard me say, "You can't crack the
22 door." You know, once it's -- it's either opened or
23 closed in my mind, and once it gets cracked open, then
24 it's wide open, so --

25 MR. SPEED: Thank you, Your Honor.

1 THE COURT: Okay. But it's sustained at
2 this point.

3 MR. FOSTER: Thank you, Your Honor.

4 THE COURT: All right. Let's talk about,
5 let's see, I guess is this next one on -- Mr. Norwood?
6 Is that what we've got? Or do we have two of them here
7 together? Yeah, does the next one deal with -- deals
8 with Norwood's testimony?

9 Humana's agreeing that they're not going to
10 try to rely on the declaration, so it's sustained to
11 that, or to allow their expert, Mott, will not rely on
12 the declaration, but Humana wants to introduce the
13 testimony of Norwood.

14 So why do you say that that would -- why
15 shouldn't they be allowed to do that, Counselor?

16 MR. FOSTER: Your Honor, the reason for
17 that, just to give a little 50 to 30 seconds of context,
18 there are a number of publications which they will
19 introduce into evidence, and because they are more than
20 a year before the application was filed, they're prior
21 art, whether they're true or not, and we don't object to
22 that.

23 The Norwood testimony is -- to the extent it
24 repeats what's in the publications is corroborated by
25 the publications, and we don't object to that. Where

1 the dispute is, is that at his deposition, Mr. Norwood
2 went beyond that and in some cases contradicted what's
3 in the publications. In other cases had details that
4 the publications did not addressed. And although
5 admissibility would not normally be an issue in this
6 case because it's a prior invention of prior use under
7 the case we cited, particularly the Finnegan case from
8 the Federal Circuit, that oral testimony has to be
9 corroborated by something other than -- by something
10 other than the witness himself, and it's only as to
11 those details that the witnesses had in which are not
12 corroborated that we're seeking to keep out of evidence
13 because there would not be sufficient evidence to
14 support the defense.

15 THE COURT: So -- well, now, okay. Let
16 me -- this is a Florida State guy; is that --

17 MR. FOSTER: Florida State.

18 THE COURT: Okay. And so you're -- they
19 cited in their response numerous items where they said
20 this -- here's the corroboration of the testimony.

21 Now, you're saying -- what you're saying to
22 me is you've got to have specific corroboration to every
23 detail that he testifies to? You think that's what the
24 rule is?

25 MR. FOSTER: I don't know about every

1 detail, Your Honor, but if there's a limitation of the
2 claim which is not in the publication and the only
3 evidence that the Florida State system had that
4 particular feature is the oral testimony of this
5 individual who claims to have put it in there and
6 there's no corroboration of that, then that -- that's a
7 very important feature of their presentation which has
8 not been corroborated.

9 If I might, the Finnegan case, which we
10 cited in our papers, has precisely this situation where
11 the -- the patent was a combination of A, B, C, and D,
12 and the document relied upon the corroboration only of
13 A, B, and C. And they had this witness testify what
14 the Federal Circuit did, and the reversing court below
15 it, said, "Look, there's no corroboration to D. Without
16 D, then -- then this prior art assembly doesn't hold
17 water."

18 So that's -- that's the basis -- I think
19 it's very complicated, I know, to separate out all the
20 various issues, and all I can suggest to the Court is
21 that if the Court feels that uncorroborated testimony as
22 to an important part of the invention should not go in,
23 then either the parties would have to work that out or
24 the plaintiff can put in the evidence that they can show
25 they can corroborate it, they -- the Court would have to

1 fix that in some way.

2 THE COURT: Well, I've been known to fix
3 that very problem, but I like to avoid those kind of
4 fix-its. I don't enjoy those fix-its.

5 But what's the defendant's position about
6 what he's -- he's claiming is that -- that the Florida
7 State system, there is no corroboration of certain
8 elements of the claim.

9 MR. SPEED: Your Honor, we would disagree
10 with that. We -- we think there's contemporaneous
11 publications that were either authored or cited to by
12 Mr. Norwood which corroborates every element of the
13 claim.

14 THE COURT: Well, this is going to be in
15 your defense part of the case, correct?

16 MR. SPEED: Yes, Your Honor.

17 THE COURT: Well, I mean, then you don't
18 have any problem with the Court directing you, then, to
19 say that before you offer any evidence of any claim
20 limitation being present in the Florida State system
21 that you first provide corroborating evidence before --
22 can you do that?

23 MR. SPEED: I believe we can. Again, I'm
24 not sure that the Finnegan case is dispositive in the
25 sense that every element has to be corroborated

1 separately.

2 THE COURT: Well, I'm not saying -- well, if
3 there's -- it's got to be corroborated in some fashion.
4 I don't know what you mean by separately.

5 MR. SPEED: We certainly have documentation
6 to support all of the elements that Mr. Norwood
7 testified about, so we'll -- we'll --

8 THE COURT: That's the Court's directive,
9 then.

10 MR. SPEED: Okay.

11 THE COURT: All right. So it's sustained
12 for -- to the extent that you can't offer it without
13 first laying a proper predicate by having corroborating
14 evidence.

15 MR. SPEED: Understood, Your Honor. To the
16 extent -- if I may get a clarification.

17 THE COURT: Sure.

18 MR. SPEED: To the extent there may -- and I
19 believe this not to be the case, but I just want to be
20 clear. To the extent, let's say, for example, there's
21 one element that he didn't talk about, that shouldn't
22 preclude his testimony as to all the other elements
23 because you can combine references from an obviousness
24 determination, and Mr. Mott, our expert, relied on, you
25 know, evidence to determine an obviousness

1 determination. For example, let's say that --

2 THE COURT: What I was trying -- what
3 I intend -- I didn't make a ruling on what Mott could
4 offer.

5 MR. SPEED: I understand. I'm just saying,
6 Your Honor, let's suppose that -- there's -- there's
7 five elements, I believe, in this claim, and let's say
8 that I sure as day get you the exact corroboration and
9 what plaintiff wants on four of those five elements from
10 Mr. Norwood but not the fifth one.

11 I should -- I -- I believe I should be
12 allowed to still put on Mr. Norwood's testimony about
13 those four elements and the corroboration related to
14 those.

15 THE COURT: I'm -- I'm saying that you can
16 do whatever elements you can corroborate from him.

17 MR. SPEED: Okay. All right.

18 THE COURT: I'm not saying that you have to
19 get all of your testimony on that from Norwood.

20 MR. SPEED: Right. Because in reading the
21 plaintiff's motion, it was my belief in reading their
22 motion that if I couldn't get all five, I couldn't have
23 them at all, and I just wanted to make sure that wasn't
24 the case.

25 THE COURT: Well, you're going to have to

1 get number five somewhere else.

2 MR. SPEED: And I got it, Your Honor.

3 THE COURT: Okay. We understand each other.

4 All right. Your next one is -- does that
5 take care of all your motions in limine?

6 MR. FOSTER: I think so, Your Honor. That's
7 all I have notes on.

8 THE COURT: Yeah, that's -- that's what I
9 have.

10 Okay. We'll take the defendant's. Okay.
11 It seems the one that's generated the most paper is the
12 one dealing with precluding the use of documents and
13 witness produced after fact discovery.

14 So, you know, I've seen your papers going
15 back. You've got it narrowed down. What is -- what
16 documents are now in dispute?

17 MR. SPEED: There's still, Your Honor,
18 probably better than 20 documents that are in dispute,
19 many of which are website documents, documents from Visa
20 documents on the sale of or the types of point of sale
21 devices that may or may not have existed at certain
22 times.

23 These are documents that Humana did not see
24 in discovery, that were not turned over or relied upon
25 by any expert of Alexsam, and we took the depositions of

1 both their invalidity and their infringement experts.

2 In addition, Your Honor, we still have the
3 issue of the two witnesses, one of which -- and to be
4 honest with you, I'm still reading all the papers that
5 were filed. I read most of them, but one of which was
6 attached to Alexsam's response to our summary judgment
7 of noninfringement, a witness we'd never -- never heard
8 about until they were put on the witness list.

9 So we're concerned, Your Honor, that there
10 are documents, there's testimony, there's witnesses that
11 we haven't heard from, we don't know where they came
12 from, and all of this is post discovery.

13 THE COURT: Well, first of all, with respect
14 to the documents, the contract between your client and
15 the bank, you're not objecting to that?

16 MR. SPEED: Your Honor, no, I'm not
17 objecting to the contract between Humana and UMB, I
18 believe, or Bank of America.

19 THE COURT: Bank of America.

20 MR. SPEED: Yeah, Your Honor, Bank of
21 America.

22 THE COURT: And then you're not objecting to
23 those documents that are on -- from your own website?

24 MR. SPEED: Your Honor, I'm not going to
25 object to those documents.

1 THE COURT: You're objecting from the group
2 of documents that the plaintiff describes as, quote,
3 publicly available? We'll get to the witnesses, but I'm
4 trying to get the classes of documents.

5 MR. SPEED: Right, Your Honor, there's
6 several documents -- I don't know if you want me to
7 approach. I'll show you just one example.

8 THE COURT: Well, I just -- I want to make
9 sure I got them classified.

10 MR. SPEED: Okay. Good. There are several
11 documents that were apparently downloaded from various
12 websites, either the Visa websites or websites
13 illustrating the sale -- the point of sale devices, et
14 cetera. We've never seen those. We don't know the
15 purpose of what they're going to be used for.

16 THE COURT: All right. I want -- I want to
17 hear about -- that's the class that we're really talking
18 about.

19 MR. SPEED: Yes, Your Honor.

20 THE COURT: I mean, however, there doesn't
21 seem to be a dispute actually, as I read the papers, of
22 what numbers those are.

23 MR. SPEED: I don't believe -- I mean, I
24 believe we all understand what numbers are the new
25 documents.

1 THE COURT: Yeah, I want to hear from the
2 plaintiff this theory because documents are, quote,
3 publicly available that they are not required to be
4 identified prior to close of discovery.

5 MR. FOSTER: Actually, Your Honor, I
6 apologize if you got the impression that -- that was our
7 position. We are mentioning they are publicly available
8 for different reasons.

9 But let me -- let me tell you what we're
10 talking about here. We received their expert report
11 after the close of -- first of all, during discovery, we
12 produced all the documents we had. This is not a matter
13 of withholding anything.

14 THE COURT: I understand that, but --

15 MR. FOSTER: Okay. So after the close of
16 discovery, we get their expert report. We look at it
17 and we say, "Oh, no, no, no," and so we then go out onto
18 the internet and download documents which we would use
19 to cross examine this expert with, and we, of course,
20 produce them to Humana as soon as we find them.

21 The reason they weren't produced during
22 discovery is we didn't have them. We didn't look for
23 them because at that point, we did not have this report
24 from them. So this is the category which we're arguing
25 about.

1 THE COURT: Well, they're saying that
2 they're using these documents as affirmative proof of
3 the existence or nonexistence of infringement.

4 MR. FOSTER: Well, to give you --

5 THE COURT: Now, you're telling me that
6 you're going to use them solely to -- for cross
7 examining and impeachment of something that the expert
8 has said.

9 MR. FOSTER: Well, let me put it all
10 together. Before we got their expert report, our expert
11 had put together his testimony, and then the way it
12 works is then after the close of discovery, it might be
13 different. The deadlines were different and there
14 wasn't -- after the close of discovery, his expert comes
15 out with a report arguing with our expert. So then we
16 go to the internet to find exhibits that we could use.
17 True, our expert could use them, as well, in
18 anticipation of what the other guy's expert could say,
19 or we could wait until their expert gets on and use them
20 that way.

21 Either way, we -- we had to dig this stuff
22 out, so we had to be prepared to confront the issue. I
23 mean, the problem is this is a dynamic process, and we
24 had to prepare for trial rather than -- if the expert's
25 dates had been earlier -- well, before the close of

1 discovery, this issue wouldn't have arisen, but because
2 the report came out after the close, here we are, and
3 they're basing the motion on the fact that the discovery
4 deadline had past.

5 THE COURT: Well, let's hear from the
6 defendant.

7 MR. SPEED: I just want to make -- be clear,
8 Alexsam never deposed our -- any of our experts in this
9 case, so our experts never have been confronted, at
10 least as of this date, with any of these documents.

11 What's going on here, Judge, is what we
12 believe, and this is addressed in our summary judgment
13 motion, a complete failure of proof that Alexsam has on
14 the issue of point of sale devices, and we -- we're --
15 that motion is pending.

16 We saw a response that was filed yesterday
17 that included affidavits from one of these witnesses we
18 had heard of, and to be honest with you, a declaration
19 from their noninfringement expert that goes -- and we're
20 going to address that -- that goes well beyond whatever
21 we heard in his deposition or Rule 26 report, and what
22 we believe is happening is they had this failure of
23 proof, and now they are scrambling around trying to
24 download information from the internet to see if they
25 can somehow come up with that proof. It's proof that

1 they could have had. Some of the documentation is not
2 new.

3 But to sit here and say, "Well, we didn't
4 get the expert report," or "We didn't know we needed
5 it," well, it's their burden to prove infringement,
6 Judge. It's their burden to have that information
7 there. And so I am sitting here trying to figure out,
8 one, how are they going to use these documents? Where
9 did they come from? Who's going to testify about them?
10 And I've just seen them -- some of them in the last two
11 weeks.

12 So I don't believe that the -- the plaintiff
13 ought to be able to use these documents. I don't
14 believe that the plaintiff ought to be able to create
15 expert declarations in response to a summary judgment
16 motion based upon these documents that aren't in --

17 THE COURT: That's a different -- that's a
18 different issue right now.

19 MR. SPEED: But -- but that aren't any Rule
20 26 report. So they had the opportunity to take the
21 deposition of our client -- or our expert. They had the
22 opportunity to put this stuff -- as soon as they thought
23 they needed it, they should have gone out and got it and
24 sent it to us. We've never seen this until we got the
25 exhibit list.

1 THE COURT: How long after the rebuttal --
2 the rebuttal expert report did these documents come?

3 MR. SPEED: We learned about these
4 documents, Your Honor, when we started exchanging
5 exhibit lists.

6 THE COURT: Why would you wait until then?
7 I mean, you had -- how long was that after the rebuttal
8 expert report?

9 MR. FOSTER: I'm looking at the papers --
10 there's a period of several weeks we're dealing with,
11 and we produced documents on the rolling basis, Your
12 Honor. So if I -- I think that's in -- the precise
13 dates are in the papers.

14 MR. SPEED: Your Honor, I'll note just for
15 the record, if you don't mind, while they're looking,
16 some of these documents were downloaded from the
17 internet on November 10th of this year. And they're
18 trying get them in now. And by looking at these
19 documents, these are certainly documents that probably
20 have been on the internet for a long time.

21 THE COURT: Well, the motion is sustained as
22 to using those documents in their case-in-chief.
23 They're not going to be considered.

24 MR. SPEED: Okay.

25 THE COURT: Now, then, if they want to try

1 to impeach -- you've been given notice of them. If
2 they're solely for impeachment of your expert after
3 they've rested their case, well, we'll take them up at
4 that time.

5 MR. SPEED: I understand.

6 THE COURT: Understand the ruling?

7 MR. SPEED: Yes, sir. How about the
8 witnesses?

9 THE COURT: All right. Let's talk about
10 this.

11 Who are these witnesses? If I could hear
12 about who they are. Where did they come from?

13 MR. FOSTER: Well...

14 THE COURT: No, we're not talking about the
15 motion for summary judgment now. I'm just talking about
16 for trial witnesses.

17 MR. FOSTER: Who they are is an easy answer.
18 They're two individuals that work in our law office, and
19 let me tell you why they were named as witnesses.

20 Humana produced in the course of this case
21 an enormous data dump of all of the transactions done
22 with Humana cards, enormous numbers. The problem we had
23 is we have to take the Humana information and put
24 together what's called, I think, a Federal Rule of
25 Evidence 1006 exhibit, a summary of it. So we did that.

1 And one of the witnesses is just a paralegal
2 in our office who will explain, not necessarily to the
3 jury, but to the Judge as part of admissibility how the
4 summary -- how the summary of the underlying Humana
5 documentation was compiled, what the columns mean. If
6 we can simply make it a presentation to the Court of how
7 the Rule 10 -- 1006 exhibit was compiled, that will be
8 fine. She wouldn't have to testify to the jury. But
9 that was the purpose of doing that. That's the sole
10 purpose of her testimony.

11 THE COURT: That's one of the witnesses?

12 MR. FOSTER: Right. The other witness is a
13 witness, again, a paralegal from our office who went out
14 to -- in the marketplace and looked at point of sale
15 devices after -- again, after getting their expert
16 report. Talking about point of sale device, he went out
17 and looked at them and took pictures and -- no
18 pictures -- just looked at them.

19 THE COURT: Well, my problem is that my
20 recollection is I issued a claim construction order on
21 this matter back in August, didn't I?

22 MR. FOSTER: Yes, Your Honor, the end of
23 August.

24 THE COURT: And it was -- whether I'm right
25 or wrong, that's yet to be determined, but I did what I

1 did, and I know what the elements were, and, you know, I
2 know what we're talking about. This point of sale
3 device -- was it -- what's the year, '97 or --

4 MR. FOSTER: Right July '97.

5 MR. SPEED: Yes, sir.

6 THE COURT: That was certainly something
7 that the Court, with my limited capacity, thought about
8 a long time before I put that in there. So that's been
9 an element that needed to be proven. It just seems
10 terribly -- I don't see any -- what is the exception to
11 the rules? That's what -- why -- under what theory am I
12 supposed to not apply the rules? That's -- that's the
13 question.

14 MR. FOSTER: I'm not suggesting that you
15 shouldn't apply the rules, Your Honor. Are we talking
16 about --

17 THE COURT: Well, I'm talking about as to --
18 I've already -- I think I've ruled as to the documents,
19 but as to these -- what you've gone out and created here
20 at the last minute or somebody's going to testify -- I'm
21 just not clear about why it is I'm going to allow these
22 late -- you've got some documents that they went out,
23 took pictures of. You've got -- I guess you've got some
24 receipts of some type.

25 MR. FOSTER: That's correct.

1 THE COURT: And so those were obviously not
2 produced late in the game, and I'm -- I'm asking you
3 under what exception should I allow those? You know,
4 why would I not apply the rules of this Court?

5 MR. FOSTER: I accept that, Your Honor.

6 THE COURT: Okay. Those are excluded.

7 MR. FOSTER: Okay. Now, the --

8 THE COURT: Now, then, the summary of a --
9 I'm not clear on what that is, so you present that in
10 detail. I don't have that much time here today, and
11 that's not altogether y'all's fault. We got started
12 about 15 or 20 minutes late, but I'm not going to take
13 that much time on it, but I'm going to let Judge
14 Everingham rule on whether or not this summary -- do you
15 not even know that for the defendant? You don't -- you
16 didn't realize that's what it was, that it was a summary
17 of this voluminous document that y'all -- I mean, that's
18 what I'm hearing here.

19 MR. SPEED: Your Honor, we found out it was
20 going to be a summary.

21 And is it Ms. Ellis?

22 MR. FOSTER: Right.

23 MR. SPEED: Ms. Ellis submitted a
24 declaration last night in her -- in their responsive
25 motion for summary judgment. Now, we know what she's

1 summarizing, and to be honest with you, I haven't quite
2 figured out what she looked at and what she -- how she
3 summarized it yet, and it does appear, based on her
4 declaration, that she was talking about a little bit
5 more than that.

6 I mean, we were aware that a summary was
7 going to be made, but we haven't been made aware of what
8 the summary evidence was. Certainly, we'll address, if
9 you want, to the propriety of the summary evidence, but
10 if this Court or Judge Everingham is inclined to allow
11 this witness, we certainly would like to talk to her
12 before she's put on the stand here in Marshall, and I'm
13 not -- I'm not saying I'm giving up my request to have
14 her excluded completely, but if the Court is so inclined
15 to allow that summary evidence, plus I think there's an
16 issue of bias having your own -- you know, your own
17 paralegal, it seems to be a big risk to me on the
18 plaintiff to have their own paralegal get on the stand.

19 THE COURT: I'm very concerned about that,
20 because there is a Texas Supreme Court case that deals
21 with paralegals having same function as lawyers and
22 whether or not a lawyer can be a witness, a material
23 witness. I think the same rules apply to the paralegal.

24 MR. FOSTER: If I can help out, Your Honor,
25 in two ways. First off, we don't want to call her

1 anyway. We have these summaries, and if Judge
2 Everingham rules them in, then the witness doesn't have
3 to be there, but the other thing we can do is we can
4 have anybody -- it's Humana's documents, and somebody
5 says we added them up and we did this, if -- if they can
6 accept that the conclusions are fine, then I guess we
7 resolved that, but if someone has to testify how they
8 handled the calculations of the underlying Humana
9 information, that can all be done before Judge
10 Everingham and nobody has to testify about it. We just
11 want to get the summaries into evidence.

12 THE COURT: Well, but who's going to explain
13 to the jury what the summary means? I mean, who are
14 these summaries for, that's what -- who's going to --
15 you think a jury can look up there and say -- who's
16 going to say once -- let's just say, okay, we're going
17 to let -- we're going to let this testimony be heard
18 outside the presence of the jury, and we rule then
19 that -- or allow this summary to be presented, well, how
20 is it going to be -- who is going to testify about it
21 before the jury?

22 MR. FOSTER: Well, I can have one of the --
23 I can have one of the witnesses already on the list
24 do that and explain what the columns mean. I just
25 thought -- I just thought that having the person who had

1 actually done the -- the calculations and stuff would be
2 better, but, again, that's -- that's fine. If we can --
3 if we can get the summaries, then that's fine, and as
4 far as the presentation part, I'll have to wrestle with
5 that, Your Honor, as to which witness would be the best
6 one.

7 THE COURT: Well, you can take it up with
8 Judge Everingham. I'm just not sure about that. I'd
9 like for counsel -- I mean, if it's truly a summary of
10 your own documents, I don't -- that -- that doesn't seem
11 like that's a great surprise, actually, Counselor.

12 MR. SPEED: Your Honor, I'll commit to you
13 that I will meet and confer with Mr. Foster. If that's
14 the case, we'll look into that. I'll commit to you that
15 we will do that as to whether these are proper summaries
16 of our documents. As I sit here today, because like I
17 said, the first time I saw them --

18 THE COURT: I'm not asking you to commit one
19 way or the other. I'm just --

20 MR. SPEED: But I'll commit to that meet and
21 confer, but the summaries are new, as well, and, you
22 know, we'll be prepared to address it with --

23 THE COURT: Well, I'll tell Counsel this,
24 what you should be prepared to do, if he wants to
25 take -- after y'all confer, if he wants to take the

1 deposition of that witness as to how they were done, if
2 you've got some real question, then you need to be
3 prepared to produce that witness here in Marshall,
4 Texas, next Thursday afternoon, the 3rd after --

5 MR. SPEED: Okay.

6 THE COURT: So you may need her here to
7 testify in front of Judge Everingham anyway, if y'all
8 ever unable to resolve it.

9 MR. FOSTER: Thank you.

10 MR. SPEED: Your Honor, may I address one
11 more thing on that?

12 THE COURT: Yes.

13 MR. SPEED: Just because we end up deposing
14 her, doesn't mean we still believe that she should be
15 permitted to testify at trial in front of a jury.

16 THE COURT: I understood that.

17 MR. SPEED: Okay.

18 THE COURT: And I've got a very serious
19 question in my own mind about that.

20 MR. SPEED: Okay.

21 THE COURT: But nobody said anything about
22 it yet, but it's bothering me.

23 All right. Let's see, does Humana have
24 another motion for -- in limine here that I need to
25 address?

1 MR. SPEED: Your Honor, we don't have a
2 motion in limine. There is a pending Daubert motion
3 related to Alexsam's expert on damages.

4 THE COURT: I'll give you a ruling on that
5 next week because that's just -- the briefing on that
6 just --

7 MR. SPEED: Just closed yesterday, Your
8 Honor.

9 THE COURT: Closed yesterday, and --

10 MR. SPEED: And we also have a pending --

11 THE COURT: Have motion for summary
12 judgment.

13 MR. SPEED: Right.

14 THE COURT: And I'll give you a ruling on
15 that before we go to trial, also.

16 MR. SPEED: Your Honor?

17 THE COURT: I guess we're going -- do I
18 anticipate you're going to have some motion to strike
19 these summaries?

20 MR. SPEED: I'm going to have a motion to
21 strike affidavits containing the summary, as well as the
22 motion to strike the expert report or the expert
23 declaration that's attached to Alexsam's response, and I
24 was going to request in that motion, or I can do it now,
25 I guess I'll do it now since I'm here, an expedited

1 briefing on that motion to strike. We can have that
2 into you tomorrow morning.

3 We believe that the expert on
4 noninfringement went well outside the bounds of his
5 expert report and his deposition.

6 THE COURT: Well, then the plaintiff's
7 response to that is due Tuesday of next week at 5:00
8 o'clock Central Daylight Time. And that way I'll try to
9 get everything ruled on before we start to trial.

10 Okay. You're putting me on a real -- we're
11 on a short time frame.

12 MR. SPEED: We'll keep the motion short,
13 Your Honor.

14 THE COURT: I've already put you on notice
15 of that limited capacity of what I can take in and
16 understand.

17 MR. SPEED: Your Honor, I'm familiar -- well
18 familiar with your record, and you're selling yourself
19 real short, to be honest with you.

20 THE COURT: Those that know me well, know
21 I'm only telling you truth. The Court always tells the
22 truth, Counselor.

23 MR. SPEED: Absolutely.

24 THE COURT: All right. What else do we have
25 to talk about that y'all need? Anything else from the

1 plaintiff here this morning?

2 MR. FOSTER: Looking around for suggestions,
3 I don't think so, Your Honor.

4 MR. WELCH: Nothing further from -- nothing
5 further from the defendant, Your Honor.

6 THE COURT: Well, I'll see y'all Monday
7 morning, and y'all have a nice -- happy Thanksgiving.
8 Travel safely.

9 MR. RUGG: Thank you, Your Honor.

10 COURT SECURITY OFFICER: All rise.

11 (Recess.)

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the stenographic notes
5 of the proceedings in the above-entitled matter to the
6 best of my ability.

7

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SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/10	

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